

News ReleaseNational Labor Relations Board Office of the General Counsel

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Fifth Circuit Court of Appeals affirms injunction sought by NLRB, tells El Paso disposal company to rehire workers, bargain with union

Affirming a district court order, a federal appeals court has told an El Paso garbage collection and disposal company that it must rehire 32 union-supporting employees, rescind unlawful changes made to working conditions, and return to the bargaining table, pending a decision on the case by the National Labor Relations Board.

The Fifth Circuit Court of Appeals rejected an appeal by El Paso Disposal to reverse the lower court, saying in its November 4 decision that "a refusal to reinstate in this case would merely reward EPD for its unfair labor practices." The Court also affirmed that the Board had properly delegated the authority to seek such an injunction to its General Counsel before its membership dipped to two members. In addition, the Board's subsequent reduction in membership did not retroactively invalidate that delegation.

It was the first published case in 35 years in which the Fifth Circuit has ruled on an NLRB injunction. In the previous case, *Pilot Freight Carriers*, the court denied the injunction.

The El Paso case dates back to the fall of 2006, when the International Union of Operating Engineers, Local 351, was certified as the bargaining representative of the company's maintenance workers and drivers following NLRB-supervised elections. Over the next fourteen months, company and union representatives met periodically to bargain, but there was little progress made on key issues.

In November 2007, after declaring that it had reached impasse, the company made a "last, best and final offer" that included many articles that had not been agreed upon, including a management rights clause that gave the company sole discretion in disciplining, discharging, subcontracting and laying-off employees. The union filed charges with the NLRB alleging that the company was refusing to bargain. At the same time, employees voted to strike. On

November 21, the strike began and 55 employees joined the picket line. By the end of the week, the company had hired replacements for all the strikers.

In early December 2007, the union made an unconditional offer to return to work, but the company refused to take the strikers back, saying there were no vacancies. Under the National Labor Relations Act, if a strike is called over an unfair labor practice, striking workers must be given their jobs back if and when they offer to return, even if replacement workers had been hired. Subsequently, an NLRB Regional Director and an NLRB Administrative Law Judge agreed that the employer had violated the Act and that the strike was over an unfair labor practice.

In July, 2009, after issuing several complaints against the employer, NLRB Regional Director Cornele Overstreet sought a temporary injunction to halt the illegal activity and restore the status quo at the company until the matter was resolved through the NLRB's administrative processes. The district court granted the injunction following a hearing. The Fifth Circuit's decision of last week upholds that decision.

The National Labor Relations Board is an independent federal agency vested with the authority to safeguard employees' rights to organize and to determine whether to have a union as their collective bargaining representative, and to prevent and remedy unfair labor practices committed by private sector employers and unions.

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